Hatara (M) Sdn Bhd v Petroliam Nasional Bhd (Petronas) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–962 OF 2004
HASAN LAH, SURIYADI AND KANG HWEE GEE JJCA
8 JANUARY 2010

Civil Procedure — Action — Reinstatement of action — Action struck off for failure to comply with case management directions — Whether delay of three months in applying to reinstate due to plaintiff's impecuniosity reasonable — Whether conduct of plaintiff in not complying peremptory order intentional and contumelious — Whether proper case for reinstatement

Civil Procedure — Case management — Failure to comply with case management directions made — Peremptory order — Miscarriage of justice — Whether plaintiff ought to apply to reinstate or appeal against it

Civil Procedure — Striking out — Failure to comply with peremptory order for case management directions — Whether plaintiff ought to apply to reinstate or appeal against it — Whether proper case for reinstatement

The plaintiff/appellant commenced this action against the first defendant/first respondent and the second defendant/second respondent purportedly for the defendants' failure to amend the terms of a letter of credit. Several case managements were held and the court fixed a final case management date on 16 April 2004 for the plaintiff to comply with the case management direction. The court also made a peremptory order that if the plaintiff failed to comply with the case management direction by 16 April 2004, the action would be struck out. On 16 April 2004, counsel for the plaintiff informed the court that he was unable to comply with the case management direction and would apply to discharge himself. The court then enforced the peremptory order and struck out the action. On 16 April 2004 the plaintiff filed an application to reinstate the action. The reinstatement application was dismissed. Hence this appeal.

Held, allowing the appeal:

(1) The plaintiff's case was struck out and not dismissed. When making the order of striking out of plaintiff's suit the learned judge did not hear the case on merits. On the facts of the present case, the plaintiff had locus

to apply to reinstate this action under the inherent jurisdiction of the court pursuant to O 92 r 4 of the Rules of the High Court 1980 as the suit had not been heard (see paras 11, 13 & 15).

(2) The reinstatement application was filed by the plaintiff after a delay of about three months. However, the explanation in the plaintiff's affidavit in support that the delay was due to the plaintiff's impecuniosity was reasonable (see para 17).

(3) In the plaintiff's affidavit-in-support the plaintiff stated that by 16 April 2004 the documents were ready for filing but were not filed by the plaintiff's counsel because on 15 April 2004 the plaintiff counsel had filed an application to discharge themselves on the ground that the plaintiff did not pay them the fees. On 16 April 2004 the plaintiff's counsel applied for a new date for case management so that the plaintiff could get another counsel to represent them. Hence, it could not be said that the conduct of the plaintiff in not complying the peremptory order of the court was intentional and contumelious (see paras 17–19).

(4) To strike out the plaintiff's suit in such circumstances would involve an error in principle in the exercise of judicial discretion and it had occasioned a substantial miscarriage of justice. This was a fit and proper case for interference by the court (see para 21).

[Bahasa Malaysia summary

Plaintif/perayu memulakan tindakan ini terhadap defendan pertama/responden pertama dan defendan kedua/responden kedua akibat kegagalan defendan-defendan meminda syarat-syarat surat kredit. Beberapa pengurusan kes telah dijalankan dan mahkamah memberikan satu tarikh pengurusan kes terakhir pada 16 April 2004 bagi plaintif mematuhi arahan pengurusan kes. Mahkamah juga telah membuat perintah muktamad bahawa jika plaintif gagal mematuhi arahan pengurusan kes berkenaan sehingga 16 April 2004, maka tindakan plaintif akan dibatalkan. Pada 16 April 2004 tersebut, peguam plaintif memberitahu mahkamah bahawa beliau masih tidak dapat mematuhi arahan dan sekaligus membuat permohonan untuk menarik diri dari mewakili plaintif. Mahkamah kemudiannya menguatkuasakan perintah muktamad dan membatalkan tindakan tersebut. Pada 16 April 2004 plaintif memfailkan permohonan menghidupkan semula tindakan tersebut. Permohonan menghidupkan semula tersebut ditolak. Maka rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Kes plaintif adalah dibatalkan dan bukannya ditolak. Bila membuat perintah pembatalan, yang arif hakim tidak mendengar kes berdasarkan merit. Berdasarkan fakta kes ini, plaintif mempunyai locus standi untuk memohon memulihkan guamannya di bawah bidang kuasa sedia ada

mahkamah di bawah A 92 k 4 KMT disebabkan guaman masih belum didengar (lihat perenggan 11, 13 & 15).

(2) Permohonan menghidupkan semula tersebut difailkan oleh plaintif selepas kelewatan selama tiga bulan. Walau bagaimanapun penjelasan dalam afidavit plaintif bahawa kelewatan tersebut adalah disebabkan oleh kemiskinannya adalah munasabah (lihat perenggan 17).

(3) Plaintif dalam afidavit sokongannya mendakwa bahawa dokumen-dokumen sudah sedia untuk difailkan pada 16 April 2004, tetapi tidak difailkan kerana peguam plaintif telah pun memfail permohonan untuk menarik diri pada 15 April 2004 atas alasan plaintif tidak membayar yuran mereka. Pada 16 April 2004 peguam plaintif memohon untuk satu pengurusan kes yang baru bagi membolehkan plaintif mendapatkan peguam yang baru untuk mewakilinya. Oleh itu, ia tidak dapat diputuskan sama ada kelakuan plaintif dalam tidak mematuhi perintah muktamad mahkamah adalah disengajakan atau bertujuan untuk menghina mahkamah (lihat perenggan 17–19).

(4) Untuk membatalkan tindakan plaintif dalam keadaan ini akan mewujudkan kekhilafan prinsip dalam melaksanakan budi bicara kehakiman dan akan menyebabkan salah laksana keadilan yang besar. Ini adalah suatu kes yang wajar dan sesuai untuk mahkamah ini campur tangan. (lihat perenggan 21).]

Notes

For cases on case management in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1642–1648.

For cases on reinstatement of action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 160–167.

For cases on striking out in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6653–6808.

Cases referred to

Arab-Malaysian Credit Bhd v Tan Seang Meng [1995] 1 MLJ 525, CA (refd)

Chua Cheng Wan v Chua Thiam Siew & Ors [1999] MLJU 602; [2000] 1 CLJ 433, HC (refd)

Lim Oh & Ors v Allen & Gledhill [2001] 3 MLJ 481, FC (refd)

Malaysia Travel Bureau Sdn Bhd v Melia Majlis [2008] 8 MLJ 290, HC (refd)

Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd [2004] 4 MLJ 446; [2004] 3 CLJ 88, CA (refd)

Multiview Enterprise Sdn Bhd v Orientus Industry Sdn Bhd [2005] 7 MLJ 282, HC (refd)

Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143, HC (refd)

Rachman v Tabrum (1923) 39 LTR 380 (refd)

Ratnam v Cumarasamy & Anor [1964] 3 All ER 933, PC (refd)
Tan Lee Siang & Ors v Kenneison Brothers Sdn Bhd [1999] 5 MLJ 716, HC (refd)
Tee Ha Leong v Messrs Low & Lim & Anor [2005] 4 MLJ 426, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 92 r 4

Appeal from: Suit No D2–22–1228 of 1999 (High Court, Kuala Lumpur)

Tabian Tahir (Tabian Tahir & Co) for the appellant.
Shamsul Bahrin Manaf (Syarihah Razman with him) (Shook Lin & Bok) for the first respondent.
CS Wong (Lee Hisammudin) for the second respondent.

Hasan Lah JCA::

[1] This is the appellant's appeal against the High Court's decision given on 16 August 2004 dismissing the appellant's application vide a summons in chambers dated 16 July 2004.

[2] On 3 August 2009 we allowed the appeal with costs. We now give the grounds of our decision.

[3] In this judgment we will be referring to the appellant as 'the plaintiff' and the first and second respondents as 'the first defendant' and 'the second defendant' respectively.

[4] The plaintiff commenced the action in the High Court against the first defendant and the second defendant on or about 30 April 1999 purportedly for the defendants' failure to amend the terms of a letter of credit issued by Banque Paribas.

[5] On 18 August 2003, the plaintiff took out a notice for pre trial case management. The case management was held on 23 September 2003, 3 December 2003 and 4 March 2004.

[6] On 4 March 2004, the parties informed the court that all the documents had been agreed upon. The court fixed a final case management date on 16 April 2004 for the plaintiff to comply with the case management direction. The court had also made a peremptory order that if the plaintiff failed to comply with the case management direction by 16 April 2004, the action would be struck out.

[7] On 16 April 2004, counsel for the plaintiff, Mr Tabian Tahir informed the court that he was unable to comply with the case management direction and would apply to discharge himself. He did not request for more time to comply with the case management direction.

[8] Given the plaintiff's failure to comply with the case management direction, the court enforced the peremptory order and struck out the action ('the striking out order'). The plaintiff did not appeal against the striking out order.

[9] On 16 July 2004, the plaintiff filed an application to reinstate the action vide the summons in chambers dated 16 July 2004. The reinstatement application was dismissed with costs on 16 August 2004.

[10] Before us learned counsel for the first defendant submitted that the plaintiff's application for reinstatement to the High Court was procedurally flawed. The proper course of action to be taken by the plaintiff in the circumstances of the case was by way of an appeal to the Court of Appeal against the striking out order. In support of that the following cases were cited:

(a) *Malaysia Travel Bureau Sdn Bhd v Melia Majlis* [2008] 8 MLJ 290;

(b) *Multiview Enterprise Sdn Bhd v Orientus Industry Sdn Bhd* [2005] 7 MLJ 282;

(c) *Chua Cheng Wan v Chua Thiam Siew & Ors* [1999] MLJU 602; [2000] 1 CLJ 433; and

(d) *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481.

[11] It must be noted that the plaintiff's case was struck out and not dismissed. There is a distinction between striking out and dismissing a case. In *Tee Ha Leong v Messrs Low & Lim & Anor* [2005] 4 MLJ 426 James Foong J (as he then was) said at p 432:

> [27] Having considered the above authorities, which are all made — by courts of concurrent jurisdiction, I am of the view that there is a distinction between striking out and dismissing a case. If the case if struck out then O 35 r 2(1) of the RHC can be utilised to apply for reinstatement. But when the case is dismissed, as in this instance case, then the avenue open to the aggrieved party is to appeal. This is based on the rational that the case was already heard on merits.

[12] It is also to be observed from the notes of proceeding on 16 April 2004 the learned judge did not hear any explanation from the plaintiff's counsel for the alleged non-compliance of the peremptory order. Counsel for the plaintiff

informed the court that they were discharging themselves. The plaintiff's representative was not present. In the affidavit in support of the plaintiff's summons in chambers dated 16 July 2004 Muhammad Nur Affendi bin Mohamad Radzi, the plaintiff's managing director, stated in para 13 of his affidavit that on that day he went to Wisma Denmark and not Bangunan Sultan Abdul Samad. His counsel applied for another date for case management so that the court could hear the application by the plaintiff counsel to discharge themselves first.

[13] What is also clear from the notes of proceeding is that when making the order of striking out of plaintiff's suit the learned judge did not hear the case on merits.

[14] In *Tan Lee Siang & Ors v Kenneison Brothers Sdn Bhd* [1999] 5 MLJ 716 KC Vohrah J cited with approval the observation made by Lord Chief Justice Hewart in *Rachman v Tabrum* (1923) 39 LTR 380 at p 381:

> The principle is where a summon to case has not been heard, but merely struck out, the court may if it thinks fit, hear or entertain the summon or case, but if there has been a hearing on the merits, though in the absence of one party, it cannot do so after the order is perfected.

[15] On the facts of the present case we were satisfied that the plaintiff had locus to apply to reinstate this action under the inherent jurisdiction of the court pursuant to O 92 r 4 of the Rules of the High Court 1980 as the suit had not been heard. Where the rules do not lay down a particular form of procedure to meet the exigencies of a case, the court may exercise its powers under O 92 r 4 (see *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143). In *Arab Malaysian Credit Bhd v Tan Seang Meng* [1995] 1 MLJ 525 at p 536, Gopal Sri Ram JCA said:

> Quite apart from O 6 r 7, there is wide power under O 3 r 5 conferred upon the High Court to extend time. Even the restriction of granting more than one extension of 12 months expressed in O 6 r 7 may, in appropriate cases, be overcome by having resort to O 92 r 4 (absent in the English RSC) which is a jurisdictional provision (see *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143).
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> Further, in a recent and yet unreported judgment of this court, reference has been made to the important principle that a rule of court should not be construed so as to produced unfairness or a manifest injustice (see *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd*, Court of Appeal Civil Appeal No P-02–7 of 1994 (since reported in [1995] 1 MLJ 292) Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to a rule of court will result in injustice.

[16] The drawback in hearing this appeal was that there was no written judgment given by the learned judge. We do not know whether the plaintiff's application for reinstatement was dismissed because the learned judge found the court had no jurisdiction or because the court was of the view that the discretion ought not to be exercised in the plaintiff's favour. An appellate court will not interfere with the discretion exercised by a lower court unless it is truly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (see *Ratnam v Cumarasamy & Anor* [1964] 3 All ER 933).

[17] Learned counsel for the first defendant also raised the issue of delay on the plaintiff's part in making the application for reinstatement. The suit was struck out on 16 April 2004 but the application was filed by the plaintiff on 16 July 2004. It was a delay of about three months. In the plaintiff's affidavit in support the plaintiff explained the reason for the delay in para 18. The plaintiff took time to find money to pay the counsel's fees. It was clear from the affidavit that the plaintiff's counsel wanted to discharge themselves on the ground that they were not paid their fees by the plaintiff. We were of the view that the explanation that the delay was due to the plaintiff's impecuniosity was reasonable.

[18] The next issue for determination is whether the discretion should be exercised in favour of the plaintiff. In the plaintiff's affidavit in support the plaintiff stated that by 16 April 2004 the documents were ready for filing but were not filed by the plaintiff's counsel because on 15 April 2004 the plaintiff counsel had filed an application to discharge themselves on the ground that the plaintiff did not pay them the fees. On 16 April 2004 the plaintiff's counsel applied for a new date for case management so that the plaintiff could get another counsel to represent them.

[19] On the facts of the present case we are unable to say that the conduct of the plaintiff in not complying the peremptory order of the court was intentional and contumelious. In this connection the Court of Appeal in *Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd* [2004] 4 MLJ 446 at p 451; [2004] 3 CLJ 88 at p 94 said:

> Order 34 r 7 provides for the discretionary power of the judge to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the judge at any pre-trial case management conference.
>
> Whilst it is true that a party's action or counterclaim could be struck out for non-compliance with a peremptory or an unless order of the court, the order would not be made unless there is a history of failure to comply with other orders. A peremptory or an unless order is an order of last resort (see *Hytec Ltd v Coventry*

City Council [1997] 1 WLR 1666 at p 1674 para H). Surely, it would not meet the ends of justice if the order made results in a miscarriage of justice. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalising the defaulting party (see *In re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196 (CA)).

[20] In the affidavit-in-support the plaintiff stated that there was merit in the claim and the plaintiff was willing and able to proceed with the action. According to the plaintiff if the application for reinstatement is not allowed the plaintiff would be prejudiced because a fresh action against the defendants would be barred by the limitation period.

[21] In our view, to strike out the plaintiff's suit in such circumstances would involve an error in principle in the exercise of judicial discretion and it had occasioned a substantial miscarriage of justice. We were of the view that this was a fit and proper case for interference by this court. Accordingly, we allowed the appeal and set aside the order of the learned judge and reinstated the case. With regard to costs we ordered that costs of this appeal and all costs thrown away as a result of the striking out of the plaintiff's suit be borne by the plaintiff and the deposit paid into court be paid to the defendants to account of taxed costs.

Appeal allowed.

Reported by Kanesh Sundrum